

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

C. POLITIS & CO., INC.

and

Case 4-CA-32606

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, DISTRICT COUNCIL 21

Barbara C. Joseph, Esq., for the General Counsel.
Walter M. Flamm, Jr., Esq., of Blue Bell, PA, for the Respondent.

Decision

Statement of the Case

David L. Evans, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Philadelphia, Pennsylvania, on March 11, 2004. On November 24, 2003,¹ International Union of Painters and Allied Trades, District Council 21 (the Union), filed the charge in Case 4-CA-32606 alleging that C. Politis & Co., Inc. (the Respondent), had violated certain unfair labor practice provisions of the Act. After administrative investigation of the charge, the General Counsel of the National Labor Relations Board (the Board) issued a complaint alleging that the Respondent had violated Section 8(a)(3) and (1) of the Act by discharging employee Robert Hinson.² The Respondent duly filed an answer to the complaint denying the commission of any unfair labor practices.

Upon the testimony³ and exhibits entered at trial, and after consideration of the briefs that have been filed, I enter the following findings of fact and conclusions of law.

I. Jurisdiction and the Labor Organization's Status

As the parties stipulated, the Respondent, a corporation with an office and place of business in Newtown Square, Pennsylvania, is engaged in the business of painting contracting. During the year preceding the issuance of the complaint, the Respondent in the course and conduct of said business operations purchased goods and materials valued in excess of \$50,000 directly from suppliers located at points outside Pennsylvania. Therefore, at all material times the Respondent has been an employer that is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent admits in the answer, at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

¹ All subsequently mentioned dates are in 2003, unless otherwise indicated.

² Section 7 of the Act provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) provides that it is unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 8(a)(3) provides that it is unlawful for an employer "by discrimination ... to encourage or discourage membership in any labor organization."

³ Portions of the transcript have been electronically transferred. Some corrections to punctuation have been entered. The General Counsel's unopposed motion to correct the record is granted, except that p. 67, L. 10, is corrected to change "two hires" to "new hires."

II. The Alleged Unfair Labor Practices

A. Facts

5 In 2003, the Respondent, a nonunion painting contractor, had a contract for certain work at the Upper Merion, Upper Providence and Center City, Pennsylvania, factories of GlaxoSmithKline, Inc. (GSK). On April 18, the Respondent advertised in the local newspaper for painters. Michael Getzfread, an experienced painter and a paid organizer for the Union, responded to the advertisement by calling the Respondent's office. Pavona (Pam) Politis-Berkowitz interviewed Getzfread over the
10 telephone. Politis-Berkowitz told Getzfread that he would be hired at \$15 per hour and told him to go to the Upper Merion site on April 30 and report to Foreman Kurk Watson.⁴ On that date, Watson put Getzfread to work at the Upper Providence location.

15 Constantine (Gus) Politis is the Respondent's owner and president; he is also the father of Politis-Berkowitz. During the afternoon of April 30, Politis inspected work that Getzfread had been doing. Politis told Getzfread that he liked his work and asked if Getzfread knew of other good painters. Getzfread replied that he did, and Getzfread brought paid Union organizer, and experienced painter, John Bawell to the job on May 5. During that day, Politis told Getzfread that he was also pleased with Bawell's work, and Politis asked Getzfread if he knew of any other good painters. Getzfread replied
20 that he would try to find another. Politis then told Getzfread and Bawell that the Respondent was going to pay them \$17.00 per hour. The next day, Getzfread and Bawell brought paid Union organizer, and experienced painter, Robert Hinson to the job. Watson took Getzfread, Bawell and Hinson to the Upper Merion job to work there. During that day, Watson told Getzfread that the Respondent was happy with the work that he, Bawell and Hinson were doing.

25 Hinson is an African American; Getzfread and Bawell are white. Hinson testified that on May 9 he received his first paycheck from the Respondent. It reflected that he was being paid at \$16.00 per hour. Hinson knew that Getzfread and Bawell were being paid \$17.00 per hour, and he suspected that the difference was that he was an African American. Hinson further testified that on May 28 he asked African American painters Mark Russell and Rick Ketchmore what they were being paid; neither
30 would tell Hinson what they were being paid, but they both told him that it was less than \$17.00 per hour. Russell also told Hinson that he felt his "pain." Hinson then confronted Watson on the issue; Hinson testified: "I told him that I had discovered that African American painters were earning less than white painters on the job." Watson told Hinson to take the matter up with Politis-Berkowitz. Hinson telephoned Politis-Berkowitz, and, according to his further testimony: "I mentioned to Pam
35 about my concerns about being a new hire and only earning \$16 an hour, when the other two new-hires were earning \$17 an hour." Politis-Berkowitz replied that she could not explain the difference but she would ask Politis about it later that day and get back to Hinson during the following day. However, Politis-Berkowitz did not get back to Hinson on the following day, May 29.

40 On Friday, May 30, about 6:00 a.m., which was an hour before the painters were scheduled to report for work, Hinson appeared at the construction gate at the Upper Merion plant of GSK with a hand-lettered picket sign (about 3 feet by 6 feet) which read: "Why are black painters earning less than white painters?" Politis arrived close to 7:00 a.m. and spoke to Getzfread and Hinson separately.
45 Getzfread testified that Politis asked him, "What is the matter with that guy? Is he stupid or something?" (Getzfread did not testify what he may have replied.) Hinson testified that Getzfread asked him, "Why would you pull a stunt like that?" Hinson replied that he had attempted to cure his grievance by calling Politis-Berkowitz at the office, but he had gotten no response, "[s]o I took it upon myself to demonstrate it in this way." A GSK guard appeared and told Politis and Hinson to discuss
50 their problem off GSK's property. Politis told Hinson to leave but that the Respondent would pay him for working the day. Politis added, "I will call you over the weekend." Hinson left.

⁴ The Respondent stipulated that Watson is its agent within Section 2(13) of the Act.

Getzfread and Bawell testified that, later during the morning of May 30, Getzfread handed Politis an envelope that bore the name and return address of the Union. Inside the envelope was a letter from Jerry Volpe, business manager and secretary-treasurer of the Union. Volpe's letter stated that some of the Respondent's employees had expressed interest in being represented by the Union and that Getzfread, Bawell and Hinson "have agreed to work as organizers in this drive." (Before this point, Getzfread, Bawell and Hinson had not disclosed that they were attempting to organize the Respondent's employees.) Getzfread testified that Politis "just walked away looking at it."⁵ Bawell testified that, at some point on May 30 after he and Getzfread presented Volpe's letter to Politis, he approached Politis and Watson as they were reviewing the letter. According to Bawell, Politis asked Bawell if he was an organizer. Bawell replied that he was. Bawell further testified that he and Politis discussed the competitive market and that he "tried" to discuss with Politis "an agreement for organizing."⁶

On Monday, June 2, having heard nothing from Politis, Hinson returned to the site with the same sign. This time, however, Hinson went to GSK's "corporate" gate at the Upper Merion facility, rather than to the construction gate where he had picketed on May 30. At the same time on June 2, Getzfread and Bawell began picketing the construction gate of that facility with signs claiming that the Respondent had engaged in unfair labor practices.⁷ After the picketing at the 2 gates had gone on for a short while, Watson approached Hinson, Getzfread and Bawell and told them that Politis wanted to meet them at a nearby McDonald's restaurant.

Politis-Berkowitz met Getzfread, Bawell and Hinson at the McDonald's and told them that they had a choice of going back to work or going home. Getzfread, Bawell and Hinson responded that they would resume picketing instead. Politis-Berkowitz replied, "No, wait for my father. He will be here shortly." When Politis arrived at the McDonald's, he told Hinson that he would give him the raise to \$17.00 per hour if he would go back to work. Hinson asked if the other African American employees would also receive that rate, and Politis replied that they would. Hinson, Getzfread and Bawell then agreed to go back to work, and they did so. (And the Respondent thereafter did implement the promised raises to all of its African American employees.)

Hinson and Bawell testified that when they returned to work on June 2, Politis inspected the contents of the canvas tool bags that they had always carried to work. Politis had not done that before. Hinson and Getzfread testified that after they returned to the GSK plant, Politis began closely monitoring their work, whereas before the picketing Politis had not often appeared on the job.

Hinson further testified that on June 2 Politis assigned him to paint in a certain area of a large boiler room. Most of the painting was with black-paint, but some objects were color-coded, and Hinson had cans of other colors of paint with him on a cart that he would push to wherever he was working. Hinson did not finish the job on June 2. On June 3, when he resumed, Watson told him to paint another area in black when he finished what he was doing. Hinson agreed. Still later in the morning, Russell (who was something of a leadman) told Hinson that Politis also wanted some overhead pipes painted green. Hinson told Russell that he would do so when he finished his current assignments.

Still later in the morning of June 3, further according to Hinson, Politis approached him and asked why he was not doing the green painting. Hinson replied that he thought he should finish his other assignments first. Politis told Hinson to stop what he was doing and do the green painting.

⁵ Getzfread did not testify whether "it" was the letter or just the envelope.

⁶ As discussed infra, in his testimony Politis acknowledged receiving the envelope from Getzfread but, in testimony that I do not credit, he denied that he opened it or read Volpe's letter.

⁷ The complaint does not allege that any unfair labor practices by the Respondent caused or prolonged an unfair labor practice strike.

Hinson went to another area of the boiler room to clean up the brushes that he had been using. As he did so, he banged a roller on the rim of a drum that contained the same color of paint. (Hinson testified that he did this to free the roller's cover and let it fall into the paint where it would not dry out and become unuseable.) As Hinson was doing so, Politis approached him again and stated: "I thought I told you to paint the overhead pipes green. Why aren't you doing it?" Hinson told Politis that he was trying to clean up from his previous assignment. Politis then stated: "Leave everything where it is and go paint green pipes." Hinson testified that he replied: "Okay. Gus. You are the boss. If this is the way that you want it done, this is the way we will do it." Hinson further testified that he then proceeded to follow Politis' instructions.

On June 4, and until the end of the day on June 5, Hinson, Getzfread and Bawell worked without incident. At quitting time on June 5, Politis met with Hinson, Bawell and Getzfread. According to Hinson, Politis addressed him and stated: "I am firing you for insubordination and throwing paint and equipment around." Politis further stated that he had wanted to fire Hinson "on the spot," but that he did not know whether Hinson was a member of a "protected class" and he wanted to discuss the matter with his attorney before firing him. Hinson testified that he started to protest that he did not know what Politis was talking about, but Getzfread told Hinson not to argue and that he (Getzfread) would meet Hinson in the parking lot. (Getzfread acknowledged that he was the leader of the 3 organizers.) Hinson then began to walk away. Further according to Hinson:

As I was walking out of the building [Politis] yells out something [like], "That was a nice sign that you had. Where are your brothers now?" something to that effect.

Hinson further testified that he replied that Politis would hear from Hinson's attorney. Getzfread testified consistently with Hinson about what was said during the discharge interview.

Politis admitted that on May 30 Getzfread handed him an envelope and stated that it contained a letter from the Union. Politis testified that he did not have his glasses with him at the time and could not then read it. Politis further testified that he stuck the letter in his pocked but, somehow, it got lost without his having ever opened it.

Politis testified that on June 3 he saw that one type of pipe in the boiler room needed to be painted blue. He noted, however, that Hinson did not have blue among the cans of paint on the cart that he was using that day. Politis asked Hinson to get the blue paint and add it to his cart. Politis is an extremely excitable individual, and he shouted at many points in his testimony.⁸ The following is a copy of the transcript of what Politis testified when asked what happened next. (Some of the sentences are incomplete or convoluted, but that is the way that Politis testified. To make the transcript more easily readable, I have injected many of the punctuation marks, as well as the words that appear in brackets.)

When I asked [Hinson] to put another color on his cart, he became enraged. He looked at me. My God he looked at me, like, and he, and I hate to use the word, "What the F you asking me to do? What the F is the matter with you? I'm sick and tired of." He [turns] and he wheels his cart. He goes around the area where we are having this. And I'm sorry if I'm shouting. He gets around the area. And in the meantime I couldn't believe what I was seeing, that anybody could behave like that. And I followed [Hinson] through [the boiler room], and I go over, and I said to him, "What is the matter with you, Bob? I only asked you to put another color on it." [Hinson replied that,] "Well I'm not going to do anything else anymore and I'm sick and tired." And he's holding at that point the four-inch black roller-cover, and [by?] the handle, which he was trying to take it off.

When I went over to try to say to him, "Don't tell me that; I want you to put another color

⁸ I had to stop the hearing twice to get the Respondent's counsel to control Politis at the table.

on your cart and again probably another half a gallon can on it," he grabs the roller and throws it down on the floor. [Hinson said,] "I've had enough out of you." Well, I got scared. I mean his eyes were bulging, and I thought [that] the next thing that's going to happen [is that] he's going to try to beat me up. And I went over to Mike [Getzfread]. Mike was on his knees and he was painting.

When asked specifically what Hinson had said to him when he asked Hinson to add the blue paint to his cart, Politis testified: "He told me to go fuck myself."

The Respondent introduced a photograph of a splatter of paint on the boiler room floor that Politis identified as having been left by the roller, with handle, that Hinson threw down. Politis further testified that Hinson was about 4 feet from him when he threw down the roller. Politis testified that Getzfread was in an area of the boiler room where he could have heard what was happening, but he could not have seen Hinson throw the roller. Politis testified that, immediately after his confrontation with Hinson, he asked Getzfread what was wrong with Hinson. Getzfread replied: "I'll take care of it." Politis walked away from the work area and stayed away for several minutes. When he returned, Hinson was working as if nothing had happened.⁹

Politis further testified that he felt that he should have fired Hinson immediately upon the June 3 incident, but: "I didn't want to cause any trouble with the threats about the Union and all of the aggravation that I was going through." (Politis did not testify what "threats about the Union" he was referring to; he did testify that the Respondent was facing a deadline with GSK.) Politis called his attorney and "I found out that I had a right to fire him and I did that the very next day in the presence of [Getzfread, Bawell and Watson]." Politis testified that he discharged Hinson "for insubordination; for disrespect."

On cross-examination, Politis admitted that in an affidavit that he submitted to the regional office, he states that, at the end of the discharge interview, immediately after Hinson had cursed him again, "I looked at [Hinson] and said 'I'm sure your white brothers will protect you now.'" When asked what he meant by that remark, Politis answered: "Nothing in particular. It just came to my mind. I was so mad and so upset it just came out. Nothing in particular. I just said it."

The Respondent called employee Mark Russell who also testified about the events of June 3. According to Russell:

I was going to get materials. We keep materials in a certain place and as I was going in the back there I heard a loud someone speaking loud and it was Bob [Hinson]. Gus' [Politis'] back was to me and Bob was facing him and he said, "I'm tired of this. I'm a grown man." And at that point he had materials in his hand. I can't tell you whether it was a brush and roller. That was thrown to the ground.

At that point I didn't want to get involved in it if they were going to do something. I walked back where I was working. About a minute later Bob comes out, goes to Mike [Getzfread, and asks], "Hey what should I do?" Ten minutes or maybe 15 minutes later I see Bob going out the door.

Russell testified that what he witnessed of the incident took "15 seconds to 20 seconds, tops," that Hinson's voice was "loud," and that Hinson was "upset." Russell further testified that he could not see whether it was a brush or a roller that Hinson threw down because Politis was between him and Hinson, and Politis' body obstructed his view of whatever instrument lay on the floor after it had been

⁹ Politis further testified that, by the time of this incident, he knew that Hinson and Getzfread were "working for the Union," but he did not testify how he knew this. (Of course, Politis had admitted that on May 30 Getzfread had told him that the return-addressed envelope that he was giving Politis was from the Union, even if Politis did not admit reading the letter.)

thrown there by Hinson. On cross-examination, Russell acknowledged that he did not hear Hinson curse when speaking to Politis.

Hinson denied that he threw anything to the floor when he was approached by Politis on June 3, or that he cursed Politis, or that told him that he was "sick and tired."

B. Credibility resolutions and conclusions

The complaint alleges that the Respondent discharged Hinson in order to discourage the union activities of its employees in violation of Section 8(a)(3) and (1), or it discharged him in order to discourage the protected concerted activities of its employees in violation of Section 8(a)(1), or it discharged him for both unlawful objectives. In order to establish a prima facie case of such alleged unlawful discrimination, the General Counsel must first persuade the Board that employer animus against known union or protected concerted activities was a substantial or motivating factor in the challenged employer decision. The burden then shifts to the employer to demonstrate that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

On May 28, Hinson discussed with Ketchmore and Russell the (undisputed) fact that African American painters were being paid less than white painters. Russell agreed that he was unhappy about the fact that he was not making as much as the white painters. Hinson then protested to Watson that the Respondent was paying African American painters less than white painters. Even if he was only a self-appointed spokesman, Hinson was thereby engaging in concerted activities that are protected by Section 7 because his action was for the mutual aid or protection of all of the Respondent's African American employees.¹⁰ By the same token, it must be concluded that Hinson's picketing of the GSK job on May 30 and June 2 to protest the mutually suffered wage disparities likewise constituted protected concerted activities. Nevertheless, before it may be concluded that the General Counsel has presented a prima facie case of discrimination under Section 8(a)(1) or (3), *Wright Line* requires proof of not only known union or protected concerted activities by an alleged discriminatee; *Wright Line* also requires the General Counsel to prove animus toward those activities.

On brief, the General Counsel contends that unlawful animus toward Hinson's protected concerted activities is demonstrated by 5 factors: (1) the timing of the discharge, having come so soon after Hinson had engaged in the protected concerted activities of appealing to Watson and of picketing at the GSK gates; (2) Politis' checking Hinson's and Bawell's tool bags after they had returned to work from the picketing; (3) Politis' increasing the supervision of Hinson and Getzfread after they returned to work; (4) Politis' giving Hinson "multiple assignments simultaneously" after he returned to work; and (5) as the General Counsel puts it: "Gus Politis' departing comment to Hinson after firing him, 'your white brothers will help you now'¹¹ makes it clear that Politis was motivated to discharge Hinson because of his protected concerted activities." I do not agree. (1) The General Counsel's argument on timing assumes that nothing of consequence happened between Hinson's protected concerted activities and his discharge, except for "the fabricated, or at least greatly exaggerated incident" of June 3. As I discuss below, however, Hinson's conduct in the intervening incident was neither fabricated nor exaggerated. (2 and 3) Neither Hinson nor Getzfread nor Bawell testified that there was anything onerous or burdensome in Hinson's checking their tool bags or his watching them

¹⁰ *Mevers Industries*, 281 NLRB 882 at 885, 887 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988) (protected concerted conduct when an individual attempts to bring a group complaint to the attention of management). According to his own testimony, however, Hinson protested to Politis-Berkowitz on May 28 only about "my concerns about being a new hire and only earning \$16 an hour, when the other two new hires were earning \$17 an hour." I would not find that this complaint to Politis-Berkowitz about only his own wage deficiency was a separate act of concerted activity.

¹¹ Actually, as quoted above, Politis said "protect you now," rather than "help you now."

more closely after they returned to work. Perhaps Politis was looking for contraband when he searched the bags, and perhaps he was looking for a reason to discharge Hinson (or Getzfread) when he watched them as they worked on June 2 and 3 (and June 4 and 5). In either case, however, speculation is all that could support the conclusion that the General Counsel seeks. (4) As well, Hinson did not testify, or even suggest, that the assignments that Politis gave to him on June 3 did not need to be done, or that there was anything that was particularly onerous, or even unusual, in his being told to stop one part of a project and go to another, which is what happened. (5) Finally on the point of animus, the General Counsel contends that Politis' "your white brothers will protect you now" parting shot to Hinson "makes it clear that Politis was motivated" by Hinson's protected concerted activities. The General Counsel, however, does not explain how that remark "makes it clear," and I do not see it. The statement reflects a lamentable element of racism on the part of Politis, but it was not an act that separately reflects animus toward the protected concerted activities (or union activities) in which Hinson had engaged. Therefore, based on the General Counsel's failure to prove the existence of the Respondent's animus toward activities that are protected by the National Labor Relations Act (as opposed to other laws, or morality), I will recommend dismissal of the allegation that Hinson was discharged in violation of Section 8(a)(1) or (3).

Assuming, however, that the General Counsel has shown that the Respondent bore animus toward Hinson's protected activities, I would nevertheless recommend dismissal of the complaint. This is because, pursuant to *Wright Line*, the Respondent has shown that, after Hinson returned to work from his picketing, he engaged in conduct for which he would have been discharged, even absent his having engaged in protected concerted activities.

Hinson testified that when Politis gave him another assignment on June 3 he responded only by stating: "Okay, Gus. You are the boss. If this is the way that you want it done, this is the way we will do it." I did not believe that testimony when I heard it, and I do not believe it now. As he gave this testimony, Hinson appeared to be affecting a demeanor that was too meek to believe, especially in contrast to his demeanor at other passages of his testimony. In addition to relying on Hinson's unimpressive demeanor, I note that if, as he testified, Hinson had only agreed to do his assignment without insolent protest he would have had no reason to immediately go over to Getzfread, who was also in the boiler room and ask Getzfread what he should then do. Politis and Russell testified that that is exactly what Hinson did, and Hinson did not dispute that testimony when he was called in rebuttal. Nor did the General Counsel call Getzfread in rebuttal to dispute that testimony. Finally, Russell testified that he saw Hinson throw something down during his confrontation with Politis. The General Counsel advances no argument of why Russell would perjure himself, other than to conclude that he "was obviously trying to please his employer." To me, however, Russell was "obviously" attempting to tell the truth to the best of his recollection.

To be sure, there are credibility problems with Politis. The man is a bigot (he paid his African American employees less than his white employees, and he presumably would continue to do so if he thought that he could get away with it), and he does not appear to be able to control his mouth when he really needs to. I further firmly believe that Politis lied when he testified that he did not read the Union's letter that Getzfread handed him on May 30. Nevertheless, the penalty for a witness's bigotry, or for his lying about a relatively insignificant issue, is not the automatic rejection of all testimony that that witness has given. Where a witness is corroborated, at least to the extent that Politis was corroborated by the apparently disinterested Russell, and where that witness is contradicted only by the testimony of one who is as incredible as Hinson, I will credit that witness.

Therefore, I credit Politis, and I find that on June 3, when Politis gave Hinson the order to do

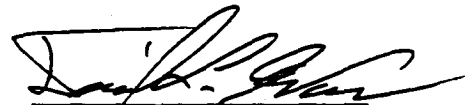
5 additional painting, Hinson threw down a paint roller and cursed Politis.¹² Politis testified that he considered Hinson's action to be one of insubordination, and I agree. The General Counsel having adduced no evidence of disparate treatment of other employees by the Respondent, I conclude that the Respondent has demonstrated that it would have discharged Hinson for such conduct, even absent his protected concerted (or union) activities.

Accordingly, I issue the following recommended¹³

ORDER

10 The complaint is dismissed in its entirety.

15 Dated at Washington, D.C., June 29, 2004



David L. Evans
Administrative Law Judge

¹² On brief, the General Counsel contends that, even if I do credit Politis, Politis provoked Hinson into his intemperate actions. Hinson, however, did not testify that he was provoked (or even slightly upset) by Politis' orders. Moreover, the cases cited by the General Counsel find provocation only where employees have previously been subjected to repeated unfair labor practices.

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.